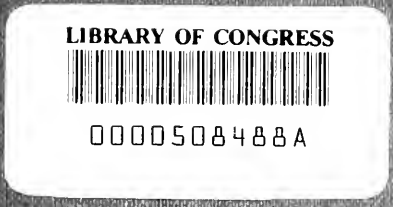

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Thomas Jefferson

as a Legislator.

—by—

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THOMAS JEFFERSON

AS A LEGISLATOR.

Thomas Jefferson was born on the 2d of April, 1743, old style. He studied law in Williamsburg, Virginia, then the colonial capital, under the great lawyer and patriot, George Wythe; and, while a law student, in 1765, when the resolutions against the Stamp Act were under discussion in the House of Burgesses, heard Patrick Henry's celebrated speech. At twenty-four years of age, in 1767, he was admitted to the bar, and rose at once into a large practice. His account books, still extant, show that in 1771, the fourth year of his practice, he was engaged in four hundred and thirty causes. In 1769 he was elected a member of the House of Burgesses from Albemarle county. His success as a practising lawyer and as a legislator are the more remarkable in view of the fact that he was not noted either as an advocate or a debater. It therefore furnishes a collateral proof of his eminent qualifications in other respects.

For the time and country in which he lived, his attainments appear to have been quite remarkable for their variety as well as for the precision of his knowledge and the range and diversity of his learning. In modern times facility in travelling has tended in many ways to render the knowledge of a number of languages comparatively frequent among well educated persons. A hundred years ago the opportunities and instruments of learning, especially in the modern languages, were comparatively few and poor. Even as late as 1815, George Ticknor, when he wished to begin the study of the German, was obliged to seek a text-book by borrowing a copy of "Werther" in one place, a grammar

(an indifferent one) in another, and sending to another State for a dictionary.

Mr. Jefferson's writings indicate no slight acquaintance with Greek literature, though he was probably less addicted to it than his friend, Mr. Wythe, who was wont to fill the blank leaves of his law books with extracts from the Greek poets and historians, in exquisitely neat Greek text. Of the Latin, Mr. Jefferson was a master. Few of his cotemporaries were as well versed as he in Anglo-Saxon, in which he took, early in life, great interest, as the parent stock of the English and the language in which the foundations of the common law had been laid.* He wrote and spoke French with fluency and elegance, having perfected himself in it during his four years' residence in Paris. While in Europe he also acquired some familiarity with Italian and German —enough of the former, at least, to give him access to the literature. He was a pioneer in the critical study of the languages of North American Indians.

His mathematical attainments were such that he made ready use of fluxions as an instrument of investigation. I have seen the discussion, made with the neatness which marked everything from his pen, to determine the curvature of the dome to his house at Monticello. An eminent professor of comparative anatomy told me many years ago that next to Cuvier, he regarded Mr. Jefferson as the best informed comparative anatomist of his time. For over thirty years he had availed himself of every opportunity for procuring vocabularies of the various Indian dialects, opportunities which he described as "probably better than will ever occur again to any person having the same desire." He had digested these in parallel columns for more ready comparison, and the whole accumulated treasure only awaited the addition of the collections made for him by Capt. Lewis, being so nearly ready for the press, when the box containing the manuscripts was stolen on the vessel by which it was shipped with his other goods from Washington to Richmond, and broken open. The disappointed thief threw the box and contents into James River. A few leaves floated ashore and were found in the mud, so few and so defaced as to be of no practical use.

Before the Revolutionary War, when he was only from twenty-five to thirty years of age, he had designed, by

*Mr. George Ticknor, describing a visit he made to Monticello in 1825, (just the year before Mr. Jefferson's death) says: "He reads much Greek and Saxon."—Life and Letters by Hillard, Vol. I, p. 343.

using his extensive acquaintance in the State, to arrange a system of daily observations of the winds and temperature. These it was his purpose to arrange and tabulate and present to the Philosophical Society at Philadelphia, "in order to engage them, by means of their correspondents, to have the same thing done in every State and through a series of years." The object of this was to determine the relations between the winds and temperature (see his letter to Volney of 8th January, 1797.) Thus he anticipated by more than a century the Meteorological Bureaux of our own and other countries. In a letter to Dr. Styles from Paris, 17th July, 1785, he made a distinct suggestion of the screw propeller. In 1796 he mentions in a letter to General Washington, that he had made trial of a *drill*, to which he refers as "the Caroline drill," for sowing a single row of seeds; and says he shall try to make one to sow four rows at time of wheat or peas. While in Paris in 1786, he had a discussion with Bouffon on certain points of natural history; found him "absolutely unacquainted" with the elk and deer of North America, and procured horns and skeletons to be sent him whereby he established his own correctness. In 1785 he brought to the notice of the Government the invention of muskets so made as to be interchangeable in all their parts, and took all the steps to cause the introduction of the system into the United States. Every detail for enabling the United States to employ this system was furnished by him to General Knox, Secretary of War, in 1789.

And so on, almost without end. No one can read the collected writings of Mr. Jefferson, especially his letters, imperfectly as they have hitherto been edited, without astonishment at the variety and minuteness of his observation, the boldness and sagacity of his inductions, and the eminently *practical* character of his intellect. The directions and scope of his speculations and inquiries force one to the conclusion that if he had lived at a period or in a State where he would have been free to pursue the studies in which he chiefly delighted, instead of being known to the world as a political philosopher, statesman and party-leader, he would have been in the very front rank of naturalists and inventors.

In the literature-making portions of the United States it has long been the fashion either to ignore Mr. Jefferson or refer to him slightly. If he had lived and done his work east of the Hudson or north of the Susquehanna, he would be rated to-day far higher among the greatest minds Amer-

ica has produced than he actually is rated, even among well informed people. That due care which his reputation has not received in the current literature of the country, would then have been bestowed. It would seem that now, time enough has elapsed for the antagonisms felt towards the party-leader to abate, at least sufficiently for us to begin to do justice to the man. As the generation which was young when he died has nearly died out, he is falling into something like oblivion. Yet he belongs to that order of men which no people in justice to themselves can fail to keep in perpetual and green remembrance. There is one aspect especially of this many-sided intellect which the appreciation of the public even in his own time and State has largely overlooked, namely, his work as a legislator. This is not difficult to explain. It is not surprising that the high career of the party organizer and politician should have thrown into the shade, almost of temporary oblivion, the earlier work which Mr. Jefferson did in this less conspicuous capacity. The arena was comparatively a narrow one—the Legislature of his native State. The time when it was done was amidst the throes of Revolution and the struggles of a war of doubtful issue. The very skill with which most of it was adapted to accomplish its ends without any shock to society or invasion of vested interests, made the transition it was designed to effect from the old to the new order, nearly an insensible one. Its leading objects were twofold. *First*, the adaptation of the municipal law of the State, to the conditions of Republican life and of civil and religious liberty; and *secondly*, to effect substantial reforms in both the civil and criminal Codes—reforms in many respects far in advance of any which had then been effected in the laws of any English-speaking State.

Young as Mr. Jefferson was when he entered the Legislature of Virginia and the Continental Congress, his acknowledged abilities as a thinker, a statesman, a jurist, and a master of the art of drafting, by the use of language at once clear, simple, concise and comprehensive, led to his being put in the lead of important committees, by which such work was to be done, in every deliberative body of which he was a member. When the first Congresses under the Federal Constitution met he was Secretary of State, and then Vice-President, so that he never sat in the Congress of the United States under the Constitution of '89; and hence his skill had no opportunity to be exercised (save by way of private suggestion) in the framing of the statutes by which the present

Government of the United States was put in operation. The body of laws which he drew, or aided in drawing for Virginia (excepting a few immediately put on their passage), was not enacted at once, but was taken up piecemeal and brought upon the statute-book, one at a time, through several years, and chiefly during the years he was in Europe; so that there was little opportunity for his agency in them to become generally known. Some of them were never adopted at all, notably his plan for the gradual abolition of slavery in Virginia, and his comprehensive scheme for the education of the youth of the State, from the earliest primary grades to the most advanced fields of the higher education. His reformation of the criminal code, too, as we shall see in the following pages, proved somewhat in advance of the time, and found acceptance a few years later in a modified form. The foregoing are some of the causes which have contributed to the result, that only among lawyers, and comparatively a few of them, is there any appreciation of the very high rank Mr. Jefferson deserves to hold as a legislator and a law reformer. Another reason is found in his rare and almost excessive modesty in the matter of claiming before the world his part in any work in which others co-operated at all.

After the Declaration of Independence had been adopted, and the Articles of Confederation reported, in the Continental Congress of 1776, on the 2d of September of that year he resigned his seat in Congress, to which he had been re-elected by the State Legislature against his protest, and returned to Virginia, to take his seat, by preference, in the lower branch of the General Assembly. This body met on the 7th of October. At this time Mr. Jefferson was thirty-three years of age. His reason for preferring a seat in the House of Delegates of his State, to one in Congress, he has himself explained. In his "Memoir" he says: "When I left Congress in 1776, it was in the persuasion that our whole Code must be revised, adapted to our republican form of government, and, now that we had no negations of councils, governors and kings to restrain us from doing right, that it should be corrected in all its parts, with a single eye to reason, and the good of those for whose government it was formed." On one of the early days of this session he introduced and carried through an act defining treason, and fixing its punishment, abolishing corruption of blood. At the same session he brought in and carried his act defining "citizenship," and recognizing the individual right of expatriation, and the act abolishing estates tail. The last named, dealing as

it did with a subject on which the ingenuity of the common lawyers had exhausted itself in the invention of technicalities, is drawn with that precision and comprehensiveness so characteristic of all his work as a legislator. This was one of the measures by which he designed to root up the feudal and aristocratic idea of keeping up the wealth and importance of families, and with its twin measure, the statute of descents, by which primogeniture and the preference of males were abolished (to which more particular attention will be given further on), fully accomplished that object.

At an early day in the same session (October, 1776) he introduced a bill "for the revision of the laws." It passed October 24th, and on November 5th, by a joint vote of the two Houses, Thomas Jefferson, Edmund Pendleton, George Wythe, George Mason and Thomas Lightfoot Lee were appointed a committee to do the work. Naturally Mr. Jefferson, as the patron and author of the measure, was the chairman of the committee. He was first named in the resolution appointing them, and his name is first signed to the report subsequently made when the work was done. But nowhere in his writings have I found that he has stated that he was the chairman. The members of this committee met in January, 1777, at Fredericksburg (a point central and relatively convenient to all except Mr. Jefferson), to take a general view of the work to be done, settle a few leading principles, and distribute the task among the members of the committee. When the distribution came to be made, Mr. Mason and Mr. Lee excused themselves, on the ground that not being lawyers they felt unqualified to take any part of it. Soon after this meeting Mr. Lee died, and Mr. Mason resigned from the committee. Under the bill for their appointment the committee had the power to fill vacancies; but this the remaining members did not feel called on to do, the leading principles fixing the lines on which the work should proceed having been already agreed on by the whole original committee. In the distribution made, the common law and British statutes down to the fourth year of James I (1607), the date of the foundation of the colony, were assigned to Mr. Jefferson; the British statutes from that date to 1776 to Mr. Wythe; and the colonial statutes to Mr. Pendleton. Obviously Mr. Jefferson had the laboring oar.

These three, having respectively gone through their several tasks, met again at Williamsburg in February, 1779, to compare their work. Together they went critically over the whole, sentence by sentence, and separated again, that each

might have made fair corrected copies of his portion. On the 18th June, 1779, the whole was reported to the Legislature by Jefferson and Wythe. Mr. Pendleton (owing to the illness of a child) did not attend, and his colleagues, finding that in preparing his portion he had simply copied out the original text of such of the colonial statutes as had been agreed to be retained, they re-drew the whole of them, to purge them of redundant words, and, as Mr. Jefferson expressed it, "to assimilate the plan and execution of this to the other parts of the work."

While this revisal was in hand, an annual session of the General Assembly came on, in the fall of 1778, and Mr. Jefferson was in his seat. At the preceding session he had brought in bills for organizing the courts—a court of appeals, a court of chancery, a general court (with appellate jurisdiction in criminal cases), and courts of assize. These measures had been crowded out by other work having relation to the state of war. They were now brought forward by him again, and passed. His former preceptor and venerated friend was elected one of the three Chancellors. A later act provided that upon the death or resignation of two of the Chancellors, no appointments should be made, to the end that there should ultimately be but one. By survivorship Mr. Wythe became, and for many years continued to be, the sole Chancellor of Virginia, and is known and reverenced in that State, as "Chancellor Wythe," much as "Chancellor Kent" is in New York—*clarum et venerabile nomen.*

The report of the revisors embraced 126 separate bills, some of which were introduced and passed before the general report was submitted. Of these the act prohibiting the slave trade was one. These bills were not adopted as a code, or single statute, nor otherwise acted on as one harmonious whole. Some idea of the condensation which had been effected may be gathered from the fact that they were all printed on ninety folio pages. It was one of the cherished hopes of the authors that the style of these bills, in which clearness and succinctness were sought to be combined, would tend to work a reformation in the vicious tautological style of the more recent British and colonial legislation—a hope realized in the period which has intervened, only to a moderate extent, in current legislation. But its influence was distinctly manifest in the Virginia Code of 1849, prepared by the late Conway Robinson and John M. Patton.

Inter arma leges silent. Mr. Jefferson was elected Governor of Virginia a few days after the Revisal was reported to the

Legislature (June, 1779). His term was a stormy one. The invasions of Arnold and Conwallis, and the conquest by Virginia of the Northwest Territory, gave the executive and Legislature much to occupy their attention, apart from the lowering aspect of the general affairs. Accordingly nothing was attempted to be done with the revision, except to print the proposed bills, until after peace with Great Britain had been signed, and Mr. Jefferson had gone to Europe as one of the plenipotentiaries of the United States with Mr. Adams, whom he regarded and treated as his senior in that commission. His residence in Paris in that character continued from 1784 until the fall of 1789, when, having returned to the United States, he became Secretary of State in the first Cabinet.

During his absence abroad, and after a year of peace had given the country a breathing space, the General Assembly in 1785, and subsequent sessions, adopted a number of the bills reported by the revisors. It was unfortunate that none of them were at hand to explain and advocate their work *as a whole*. Mr. Jefferson was in Europe; Pendleton and Wythe were judges. Among the earlier bills so passed, championed by Mr. Madison, then a young man, but already great in debate, as well as in council, was the celebrated "ACT FOR ESTABLISHING RELIGIOUS FREEDOM." On the 13th August 1786, Mr. Jefferson wrote from Paris to Chancellor Wythe as follows:

"The European papers have announced that the Assembly of Virginia were occupied on the revisal of their Code of laws. This, with some other similar intelligence, has contributed much to convince the people of Europe that what the English papers are constantly publishing of our anarchy is false; as they are sensible that such a work is that only of a people who are in perfect tranquility. Our act for freedom of religion is extremely applauded. The ambassadors and ministers of the several nations of Europe, resident at this court, have asked of me copies of it, to send to their sovereigns, and it is inserted at full length in several books now in the press, among others in the New Encyclopædia."

The concluding clause of this celebrated statute has furnished a striking instance of a repealable act, admiting on its face that it is repealable at the pleasure of any other General Assembly, but coupling that declaration with a statement of principle so cogent as to give to the law a character more durable than any mere constitutional provision. It is in these lofty words:

"And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain

the acts of succeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law, yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

Among the bills of a general character drawn by Mr. Jefferson were three upon a subject which always lay near his heart. He describes them as parts of a connected whole, embracing "a systematic plan for general education, reaching all classes of free persons: 1st, Elementary schools for all children generally, rich and poor; 2d, Colleges for a middle degree of instruction, calculated for the common purposes of life, and such as would be desirable for all who were in easy circumstances; 3d, An ultimate grade for teaching the sciences generally, and in their highest degree." These bills were never taken up by the Legislature. Their author, throughout his life, had the disappointment of finding his people in this matter, as in many others, a century, or a large part of it, behind himself. The later years of his life, from 1816 to his death, in 1826, were in some measure solaced by the establishment, under his eye and moulding hand, and largely by his unremitting personal exertions (nobly seconded by the late Joseph C. Cabell), of the University of Virginia. This institution he founded upon a plan and system far in advance of any institution of learning of like grade then in America. Among the essential features embodied in the original statutes of this institution by its founder are the independence of the schools, and the elective principle, gradually introduced by tentative stages at Harvard by the unwearied efforts and urgency of President Eliot, and adopted to a greater or less extent by other large and richly endowed institutions of learning, nearly fifty years after Mr. Jefferson's views had been formulated, and put into practical and successful operation, continuing to the present time.

The reformation of the criminal law embodied in the revision was Mr. Jefferson's work At the first conference of the committee, when all the five members were present, one vast stride in ameliorating the barbarous cruelty of the English penal laws was unanimously agreed on. This was to confine the penalty of death to the two offences of *treason* and *murder*, abolishing the revolting practice of drawing and quartering. All other felonies were punishable by confinement and hard labor, except a few, in which, against his

protest, the majority retained what he afterwards characterized as "the revolting feature of the *lex talionis.*" This reform proved somewhat too far in advance of the times. It was not adopted in the form proposed, but seventeen years later (1796) a bill substantially its equivalent was passed. The spirit of the proposed act is shown in its title—"A bill for proportioning crimes and punishments in cases heretofore capital"—and in the following paragraph from its preamble:

"And forasmuch as the experience of all ages and countries hath shown, that cruel and sanguinary laws defeat their own purpose, by engaging the benevolence of mankind to withhold prosecutions, to smother testimony, or to listen to it with bias, when, if the punishment were only proportioned to the injury, men would feel it their inclination, as well as their duty, to see the laws observed. For rendering crimes and punishments, therefore, more proportionate to each other, Be it enacted by the General Assembly, that no crime shall be henceforth punished by deprivation of life or limb, except those hereinafter ordained to be so punished."

By this bill the death penalty was removed in about twenty-seven felonies, including offences by free persons and slaves, more than the life of a generation before similar results crowned the efforts of Romilly, Macintosh and Brougham in England.* The whole bill occupies about six pages of ordinary octavo print; or with the copious notes and references—made for his own use—to the English statutes, and cases, and the Anglo-Saxon laws (which last were written in that language, accompanied in the copy he sent to Mr. Wythe by a literal translation into either English or Latin), about thirteen pages. It is a model of condensation, without loss of clearness or precision, and may be seen in the publication of the "Writings of Thomas Jefferson," edited by his grandson, T. J. Randolph, published at Charlottesville, Va., 1829, Vol. I, pp. 120 to 133, where the Saxon notes are printed with English type for want of the type for the Saxon letters. The same apology cannot be allowed for the reprint made by Congress in 1853, in nine volumes. Some idea of the slovenliness with which this work was done may be obtained from the fact that the appendix to the "Memoir," as Mr. Jefferson called it—autobiography, as the editor of the Congressional publication chose to call it—containing Mr. Jefferson's letter to Mr. Wythe of November 1, 1778, and the annotated draft of this bill, is copied *bodily* from Mr. Randolph's book, *in-*

*The annual Register for 1780 shows 87 capital convictions at the Old Baily in that year, of which 38 were for stealing, counterfeiting, or robbery, and 49 for riot.

cluding the foot-note apologizing for the use of the English letters for want of Anglo-Saxon type. See Vol. IV, p. 146.

Another of Mr. Jefferson's bills in the revision was that upon the subject of slaves. The first section, by defining who should be slaves, supplemented the act already passed, and in force since October, 1778, suppressing the African slave trade. This bill "concerning slaves" was passed in 1785. This policy of obstructing, or suppressing altogether, the importation of slaves into the State had been one deeply cherished by the leading minds of Virginia from an early day (1699). The Colonial Legislature had passed as many as three and twenty acts, having that object, before the Revolution, every one of which had been vetoed by, or by authority of, the Crown.* Against these vetoes the original draft of the Declaration of Independence launched one of its most burning paragraphs, which was stricken out in committee. The history of this alteration is thus given by Mr. Jefferson:

"The clause, too, reprobating the enslaving the inhabitants of Africa, was struck out" (from his draft of the Declaration) "in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves, and who, on the contrary, wished to continue it. Our Northern brethren also, I believe, felt a little tender under those censures; for though their people had very few slaves themselves, yet they had been pretty considerable carriers of them to others."

The last of the prohibitory acts passed by the House of Burgesses, before independence gave the State the power to act, was in 1772, only four years before the Declaration was written; so that the wrong complained of was fresh, as well as of long standing. This act was accompanied by an earnest petition to the Crown to "remove all restraints which inhibited his Majesty's Governors assenting to such laws as might check so very pernicious a commerce as that of slavery."†

The "Act for preventing the further importation of slaves" was one of the first general laws passed by the State on assuming independence (9 Henning's Statutes at Large, 471). Section 1 provides that from that date "no slave shall be

* By what was known as the Contract of Assiento, in the Peace of Utrecht, England acquired the monopoly of the slave trade (to the disgust of the Dutch) in 1713, and thenceforth was the great slave trader of the world. 1 Lecky Hist. of Eng. 18th Century, pp. 133 and 138.

† Any one interested to pursue this subject of the steady and persistent resistance of the Colony of Virginia to the slave trade may consult 1 Tucker's Blackstone, Appendix 51, note, and 1 Minor's Institutes, Bk. I, ch. 14.

imported into this Commonwealth by sea or land, nor shall any so imported be sold or bought." Section 2 imposes the penalty of a thousand pounds for each slave imported, and of five hundred pounds for every slave so bought or sold. Section 3 declared all slaves so imported to be free.* The first section of the revisor's (Jefferson's) bill "concerning slaves" was in these words: "That no persons shall henceforth be slaves within this Commonwealth, except such as were so on the first day of this present session of Assembly, and the descendants of the females of them. Slaves which shall hereafter be brought into this Commonwealth, and kept therein one whole year, or so long at different times as shall amount to one year, shall be free." It is plain that the qualification of a year's detention in the State was in tenderness for the people of the neighboring States, all of which being slaveholding, the intercourse with Virginia would be materially interfered with, if their people should be deprived of the services of their domestics, when visiting Virginia for business or pleasure, or passing through her territories. All traveling (save along the seacoast) at that day was either by private carriages, driven by slave coachmen, or on horseback attended by a mounted body-servant of the same condition.

In his "Notes on Virginia," prepared two years after the Report of the Revisors (1781), Mr. Jefferson says that it was a part of the plan of legislation agreed on by the committee on the subject of slavery (not only to root up the slave trade, as had already been done by the act of 1778, but) to put the institution itself in the way of speedy extinction, by the adoption of the principle of *post nati* emancipation—that is, to enact that all born after the passing of the act should be free. "The bill," says he, "reported by the revisors does not contain this proposition; but an amendment containing it was prepared, to be offered to the Legislature whenever the bill should be taken up." He proceeds to give the elaborate provisions contemplated for the education of the *post nati* freedmen, in such manner, according to their capacity, as might best fit them for the responsibilities of a free condition; and their colonization was to be provided for in such place as circumstances at the time should indicate as the most proper. In his "Memoir," written in 1821, he remarks on the fate of this scheme as follows:

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*This bill was drawn and proposed by Mr. Jefferson, and passed without opposition. See Complete Works (Congressional), Vol. I, p. 38.

"But it was found that the public mind would not yet bear the proposition, nor will it bear it even at this day. Yet the day is not distant when it must bear and adopt it, *or worse will follow.* Nothing is more certainly written in the book of fate than that these people are to be free. Nor is it less certain that the two races, equally free, cannot live in the same government. Nature, habit, opinion, have drawn indelible lines of distinction between them. * * * If * * it (emancipation) is left to force itself on, human nature must shudder at the prospect held up."

For forty years these were like the prophecies of Cassandra. The first half has now been fulfilled. Whether the rest was forecasted with equal prescience, only the developments of an inscrutable future can decide. The men of 1785, and of 1821–32, stood appalled at the cost of any scheme of deportation as beyond the resources of the State. Whether it would not in the end have been a wise economy to have met that strain at every sacrifice at the earlier of those dates, when the slave population of Virginia was estimated at 270,762, may well be doubted, if, as I believe may be plausibly shown, the losses in values to the white people of Virginia by the war between the States, including the slave property, was near $1,000,000,000. Another element of the computation is the relative wealth of the State as it is, and as it would have been, if emancipation had been accomplished early in the present century. And again, we have not seen the end of the negro question in America, nor do we know what expenses it may yet entail.

In the mass of legislation for his State prepared by Mr. Jefferson on her new departure, not only as an independent Commonwealth, but as one founded on principles of pure republicanism, some of the laws were necessarily of a kind liable to changes with the advance of society, the growth of population, and the changing conditions of the community. This was especially the case with the acts which had for their object the organization of the courts, providing the officers to administer the government, and defining their duties, their terms of office, modes of selection, &c. Others were original departures, intended, and effectual, to work a radical change in the texture and condition of society. Of the latter class were those whose importance largely influenced Mr. Jefferson to prefer service in the State Legislature from 1776 to 1779 to a seat in Congress.

"I considered," he said, in his "Memoir," "four of these bills passed or reported, as forming a *system* by which every fibre would be eradicated of ancient or future aristocracy, and a foundation laid for a government truly republican. (1) The repeal of the laws of entail would prevent the accumulation and perpetuation of wealth in select families, and

preserve the soil of the country from being daily more and more absorbed in mortmain. (2) The abolition of primogeniture, and the equal partition of inheritances, removed the feudal and unnatural distinctions which made one member of every family rich and all the rest poor. (3) The restoration of the rights of conscience, relieved the people from taxation for the support of a religion not theirs; for the establishment was truly of the religion of the rich, the dissenting sects being entirely composed of the less wealthy people; and (4) These, by the bill for general education, would be qualified to understand their rights, to maintain them, and to exercise with intelligence their parts in self-government. And all this would be effected without the violation of a single natural right of any one individual citizen."

A snarling criticism upon so much of this "system" as was intended to remove the feudal privileges of *primogeniture*, and the preference of males in the heirship of real property, has been imputed to George Mason, to the effect that "neither Jefferson, Wythe, nor Pendleton had a son." This does Mr. Mason, whom Mr. Jefferson describes as "a man of the first order of wisdom," great injustice; because in the conference of the full committee of revision, Mason supported these reforms. But apart from that, it imputes folly to this wise republican. At the time of the revisal Mr. Jefferson was only thirty-three to thirty-six years old, and his wife was in the prime of life. As we learn from his biographer, they had a son born pending the revision, and three children born subsequently. The criticism would impute to him incredible foresight in anticipating (what proved to be the fact) that these would all be girls.

This revision, in which much the largest and vastly the most important part fell to the young jurist of thirty-three, was an exploit of which it is difficult at this distance of time even for lawyers, and impossible for laymen, fully to appreciate the magnitude. Some of the changes were so radical, so novel in the experience of mankind, so far reaching in their effects upon society, so difficult to embody in statutes at once concise, simple, and clear, that only those who have had experience either in drafting important laws or in watching the effects in their administration of important statutory changes, can realize the difficulty of the undertaking or the marvelous skill and foresight with which Mr. Jefferson wrought as a legislator. As an illustration of this it is worth while, even to readers who have no acquaintance with technical law, to consider the Virginia "statute of descents." This bill became a law in October, 1785. Under the common law of England which was superseded by it, an inheritance was required always to *descend* to the issue of the person last in actual possession of the estate, owning

an estate of inheritance, but it never lineally *ascended*. A father could not inherit from a son or a grandfather from a grandson under any circumstances. The male issue was preferred before the female, and of males the eldest alone took the whole estate; but if there was no male heir at all to deprive them, the female heirs took as *parceners*, that is, all together, in equal shares. Lineal descendants represented their ancestor *in infinitum*. On the failure of lineal descendants of the last owner, the only *collateral* relations who could inherit were those "of the blood of the first purchaser," and the collateral heir must be a kinsman of the *whole blood* (that is, a kinsman, say a cousin, at ten or twenty removes, would be preferred to a half brother who under no circumstances could succeed). These rules are (briefly stated) the common law "canons of descent," by which English inheritances were governed, and largely are still.

Now, by Mr. Jefferson's act in Virginia, every one of them at one stroke was swept away. The estate was required to pass *in parcenary* (that is, in equal shares where a class of heirs come in), first, to the children and their descendants. This rooted up both the preference of males over females and of the oldest male over the other children of both sexes. If there be no child nor the descendant of any, to the father, and if no father, to the mother, brothers and sisters and their descendants. If these be all wanting, the estate is divided into two moieties, one going to the paternal and the other to the maternal kindred, and if there be no kindred on one side, the whole goes to the kindred on the other side in the following course: 1. To the grandfather, if one be living. 2. If none, to the grandmother, uncles and aunts on the same side and their descendants. 3. If none of these, to the great grandfathers or the great grandfather, if there be but one. 4. If none, to the great grandmothers or the great grandmother, if there be but one, and the brothers and sisters of the grandfathers and grandmothers and their descendants. And so on without end, passing to the nearest lineal male ancestors, and for want of them, to the nearest lineal female ancestors in the same degree, and the descendants of such male and female ancestors. If there be neither paternal nor maternal kindred, the whole goes first to the husband or wife, and if neither, to the kindred of the husband or wife as if he or she had died entitled to the estate according to the course above set out. When some of the heirs are of the whole blood and others of the half blood, the latter take half so much as those of the whole

blood. When a class inherits, all of the class take *per capita*, if all the class be living. If some have died leaving descendants, such descendants take *per stripes* (or by stocks), that is, the share their deceased ancestor of the class would have taken if alive. Advancements made to children by a parent are to be brought into hotch-pot with the estate descended. Alienage of an ancestor is no bar to tracing a descent through him. Bastards may inherit and transmit inheritance on the part of the mother. Marriage and recognition by the father, legitimates children born out of wedlock, and the issue of marriages deemed null in law are nevertheless legitimate.

Thus every shred of the pre-existing (English) law of descents was demolished, and a scheme based on new principles, contradictory to it, was substituted in its place. The act as adopted (and it was adopted precisely as Mr. Jefferson drew it), consists of eighteen clauses and occupies a little over a single page in the Statute Book. One feels that to state this matchless piece of work in other than its author's words is little short of profanation, and I am tempted to give its text in a note, but forbear.

Now it has not been without definite purpose that so much of the substance of the act has been stated, even at the peril of disgusting the lay-reader. It was needful to illustrate what now follows. Under the provisions of this new act, which subverted and reversed all the rules which had previously existed in the State, all the real estate which has descended in Virginia to the heirs of the generations of a hundred years, has passed to those entitled by these provisions. So precise, so comprehensive and exhaustive, so simple and clear, were the terms in which they were expressed, that in the experience of a completed century *but one single doubt as to the construction and effect of any part of it has arisen.* That single doubt was resolved by the case of *Davis* v. *Rowe*, 6 Randolph, 355. The doubt was this. It was provided that when a class of heirs came to the inheritance, if all were alive, they should take *per capita* equal shares. If some were living and others of the class were dead, leaving descendants, the living members of the class take as before, while the descendants of the dead members were to take *per stripes;* that is, they take the share their dead ancestor would take if alive. There was a third case possible, not *expressly* provided for, namely, when *all* of the class were dead, leaving descendants, should those descendants take *per capita* or *per stripes?*

Anthony Gardner, a wealthy bachelor, died. He had had one brother and one sister, both of whom had died before him, leaving issue who survived Mr. Gardner. The brother left *one* child, Mrs. Davis. The sister left two sons, who were living at A. G's death, and two families of grandchildren, the issue of two daughters who had died before Anthony Gardner. Was Mrs. Davis to stand in the place of her father and take one-half of her uncle's estate, the other half being divided among her cousins, one-eighth to each; or, as she and her cousins were all alike the nephews and neices of their uncle, was the estate to be divided into five equal parts, one of which should go to Mrs. Davis, one to each of the Rowes, her living cousins, and one pass to each family of the dead cousins? The difference to Mrs. Davis was between *one-half* and *one fifth*, and was worth a struggle. A powerful effort was made by very able counsel to maintain her claim to one-half the property by the application of the English canon of the *jus representationis*. The decision was against her. The court, in a discussion spoken of by Chancellor Kent as one "marked by great industry and legal erudition," held that the statute of descents was a total destruction of each and all of the rules of the common law of descents, including the *jus representationis;* and that it furnished a complete rule in itself; that while the case before the court was not expressly provided for, the act contained the principle which governed it, namely, that it follows the natural course of the affections of the heart, preferring as heirs the *classes* nearest in blood, and in the same class giving the individuals nearest the intestate larger portions, and allowing those more remote to take *per stripes*. After this decision, the ruling of the court was incorporated into the act by an amendment.

While in regard to this statute it may be said, as probably could not be said of any other specimen of human legislation of the like importance, that in a hundred years but one doubt could be raised as to the meaning and effect of any part of it, a single section added by the Legislature in 1790, by another hand, to meet a special and comparatively rare state of facts, has been a fruitful source of litigation. The cases in which inheritances pass under this change in the scheme of Mr. Jefferson's bill are probably not one-tenth of one per centum in number or value, of those which are controlled by the rest of the statute; yet while no question can be raised as to his workmanship, the amendment has given rise to quite a swarm of cases in the

Supreme Court of the State to construe its meaning and effect. Such is the difference between perfect and imperfect work.

It would be an extremely interesting study to trace how far these various acts and proposed bills of which Mr. Jefferson, while still a young man, was the author, were original with him, as law reforms. Many of them embodied the earliest advances in the way of reform to the condition of statute law, made by any English-speaking people on either side of the Atlantic, so far at least as I have been able to ascertain. For example: the act defining citizenship contained, I believe, the first statutory declaration of the right of expatriation. His amelioration of the brutal severity of the English and colonial criminal law was many years in advance of any substantial step in that direction in Great Britain, where, as late as 1828–30, Lords Eldon and Tenterden were obstructing what the Report of Revision offered in 1779, and the Legislature adopted in 1796. His drafts of the bills for general education by the State were, it is believed, many years before such an attempt was formulated anywhere else in the world. His act of 1778 was the first abolition and prohibition of the African slave trade. On this cherished policy of Virginia, to which she had adhered from 1699, and which she introduced into her deed of cession of the Northwest Territory, she was outvoted in the Convention which framed the Federal Constitution, and had to submit to see it superseded for twenty years by the "supreme law." But Mr. Jefferson never lost sight of it. In his message in 1806 he calls the attention of Congress to the approach of the period when under the Constitution it would have power to prohibit the slave trade, and suggests timely prospective legislation, so as to take away all pretext that expeditions had been set on foot before it could be known that prohibitory acts would be passed. Mr. Jefferson was the owner of immense bodies of unimproved lands. His consistent action on this subject was therefore disinterested, as well as early, dating from a time before the birth of the movement in England. He was legislating prohibition when Thomas Clarkson was a school boy.

The Virginia Bill of Rights (1776) and the statute of Religious Liberty were the first formal sovereign declarations of their kind in Christendom. They struck the key-note of modern progress towards *real* freedom of religious opinion—the sovereign right in each individual MAN to regulate his faith and his religious associations according to the dictates

of his own conscience. It was not "toleration," but freedom of belief, absolute and universal, first then made a fundamental law, under which no form of persecution could be possible. So again with the acts abolishing estates tail, the preference for males and primogeniture. Estates tail appear to have survived in some of the States for many years. In most of them the effect of that kind of settlement of property, in keeping up the wealth and consequence of families, was greatly impaired by provisions affording easy means of docking the entail, as by the mere deed of the tenant in tail in possession. Virginia led the vanguard in their deletion. New York followed in 1782; North Carolina in 1784; Kentucky in 1796; New Jersey in 1820. In Maryland, Pennsylvania, Georgia and the New England States they have lingered in a more or less crippled condition, far into the present century.

So, too, Mr. Jefferson was the first legislator using the English language to uproot and sweep away the principle of primogeniture, and along with it every trace of the feudal rules by which preference was given to males, and to establish, in the place of that highly artificial system, the rational and simple principle that real property, like personal, should go, on the death of the owner intestate, to those whose relation to the owner indicates, according to the laws of natural affection, that they should succeed to his estate. One consequence of this legislation has been that in Virginia it is much less the rule for persons to make wills than (as I believe) is the case generally elsewhere. It is a common remark of men, in whose families no special cause for special provision in case of death exists, that "the law makes as good a will as they care to have."

No one who will take the trouble to compare the work done by Jefferson with that of other framers of statutes of a general nature, can fail to rise from such comparison with the conviction that he was a master workman of the highest order. Great achievements in codification have been made from time to time, from the days of Justinian to the present —I had nearly said to the days of David Dudley Field. The Code Napoleon has stood the test of nearly three quarters of a century, and throughout the world is recognized as vindicating the Emperor's boast, "I shall go down to posterity with the Code in my hand." Many of the great English statutes have dealt with special subjects in a masterly way. Much work of the same quality has been done in the United States, especially in the earlier Congresses, in not a

little of which the hand of Mr. Madison may be regarded as visible. But however admirable the style in which such work has been done elsewhere or in other times, I believe that, beyond all cavil, the Virginia Statute of Descents is the only important statute in the history of human society which in a century of experience has given rise to but one single controversy as to the meaning and effect of any of its provisions. In all the essentials of excellence it is unique. Exhaustive, precise, perspicuous, simple, comprehensive, it is the only known specimen of human legislation which came from the hand of its author simply *perfect*. I say "perfect," for while one question over sixty years ago was raised as to its effect, the decision determined that the case was not *casus omissus*, but that it was ruled by the principles embodied in the act.

In view of the quality of this statute, it may fairly be said that if Mr. Jefferson had done nothing else as a legislator than to frame it as he did, that single exploit would suffice to entitle him to a place in the front rank of the law makers of the world. But when we remember that in the few years of his service in legislative bodies he was the author and draftsman of most of the acts moulding the frame of the first constitutional representative republic, organizing its government, establishing its judicature, reforming its civil and criminal codes, anticipating in these reforms those entered on elsewhere by years in most cases, and by many years in many others; that he was always in the lead in law reforms, striking out principles and stamping them on the life of the state and country, embalming them in laws so eloquent in their untechnical simplicity and exactness that no change was ever an amendment,—I say, when these things are considered, it cannot be doubted that in this comparatively youthful legislator we find one of the first lawmakers of modern times.

Indications are not wanting that society in Great Britain has outgrown the half-feudal common law of real property. The recent striking article of Sir J. F. Stephens on this subject is a significant indication that the law of inheritance there will not be much longer endured. When the time shall come for pulling down, and the work of reconstruction must be done, English lawyers and legislators may find in the Virginia Statute of Descents the work ready done to their hands, over a hundred years ago.

Lynchburg, Va., January 5, 1887.